Supreme Court, U.S.
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No. 02-0492

In The
Supreme Court of the United States

JOHN NOLEN, individually and on behalf of all persons similarly situated,

Petitioner,

vs.

NUCENTRIX BROADBAND NETWORKS, INC., a/k/a Heartland Wireless Communications, Inc., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cerberus Respondents:

Cerberus Partners, L.P.,
Cerberus International, Ltd.,
Cerberus Institutional Partners, L.P.,
and Stephen Feinberg

Nucentrix Respondents:

Nucentrix Broadband Networks, Inc.
on behalf of and as next friend of its trademarks,
trademark applications, and alleged assumed names –
Nucentrix Telecom, Heartland Cable Television,
Nucentrix Broadband Networks, Nucentrix Internet
Services, Nucentrix Spectrum, Nucentrix Telephony,
Cyberwave Heartnet, and Clear Choice TV –
Nucentrix Internet Services, Inc., Heartland Cable
Television, Inc., Nucentrix Spectrum Resources, Inc.,
Jack R. Crosby (incorrectly named as Jack R. Crosly),
Marjean Henderson, J. R. Holland, Jr., John A. Sprague,
L. Allen Wheeler, Richard B. Gold, Amy E. Ivanoff,
Carroll D. McHenry, Terry S. Parker, Neil S. Subin,
and R. Ted Weschler

QUESTIONS PRESENTED

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to question 1 presented by Petitioner because it seeks consideration of a question not accurately reflecting the proceedings or holding below. If the Court grants the Petition based on question 1, Respondents submit that the following is a more accurately phrased question:

> WHETHER THE FIFTH CIRCUIT CORRECTLY AFFIRMED DISMISSAL OF PETITIONER'S CASE WHERE IT HELD THAT THE $3.00 TO $5.00 FIXED ADMINISTRATIVE OR LATE FEES CHARGED DID NOT CONSTITUTE INTEREST UNDER TEXAS LAW AND ACCORDINGLY WERE NOT USURIUS AS A MATTER OF LAW, AND THAT THEREFORE PETITIONER HAD FAILED, AS A MATTER OF LAW, TO PLEAD THAT RESPONDENTS COLLECTED AN "UNLAWFUL DEBT" AS THAT TERM IS DEFINED IN RICO 18 U.S.C. § 1961(6), THE ALLEGED PREDICATE ACT TO PETITIONER'S RICO CLAIMS.

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to questions 2 and 3 presented by Petitioner because those questions seek consideration of questions not appropriately arising from or otherwise accurately reflecting the proceedings or holding below, and therefore would not properly be before the Court if certiorari were granted.

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to question 4 presented by Petitioner because it seeks consideration of a question not accurately reflecting the proceedings or holding below. If the Court grants the Petition based on question 4, Respondents submit that the following is a more accurately phrased question:

QUESTIONS PRESENTED – Continued

WHETHER THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONER'S CLAIM UNDER 18 U.S.C. § 1962(a) WHERE IT HELD THAT (i) NO CLAIM EXISTS UNDER § 1962(a) FOR INJURY ARISING SOLELY FROM PREDICATE RACKETEERING ACTS THEMSELVES BECAUSE § 1962(a) DOES NOT PROHIBIT SUCH ACTS; (ii) ANY INJURY UNDER § 1962(a) MUST FLOW FROM THE USE OR INVESTMENT OF RACKETEERING INCOME; and (iii) THE PETITIONER ALLEGED INJURY ARISING SOLELY FROM NUCENTRIX'S ASSESSMENT AND COLLECTION OF LATE FEES, NOT FROM NUCENTRIX'S USE OR INVESTMENT OF THOSE FEES.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents herein respectfully submit this Corporate Disclosure Statement.

Respondent Cerberus Partners, L.P. is not a nongovernmental corporation, but a privately held limited partnership. Respondent Cerberus Partners, L.P. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus Partners, L.P.

Respondent Cerberus International, Ltd., is a nongovernmental privately held company. Respondent Cerberus International, Ltd. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus International, Ltd.

Respondent Cerberus Institutional Partners, L.P. is not a nongovernmental corporation, but a privately held limited partnership. Respondent Cerberus Institutional Partners, L.P. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus Institutional Partners, L.P.

Respondent Nucentrix Broadband Networks, Inc. (a/k/a Heartland Wireless Communications, Inc.) is a publicly traded company on NASDAQ. No parent corporation or other publicly held company owns more than 10% of Nucentrix Broadband Networks, Inc. Nucentrix Broadband Networks, Inc., is the parent or holding company of the following Respondents:

Respondent Nucentrix Telecom (correct name is Nucentrix Telecom Services, Inc.) is 100% owned by Nucentrix Broadband Networks, Inc.

CORPORATE DISCLOSURE STATEMENT – Continued

Respondent Heartland Cable Television, Inc. is 100% owned by Nucentrix Broadband Networks, Inc.

Respondent Nucentrix Internet Services, Inc. (also, Nucentrix Internet Services) is 100% owned by Nucentrix Broadband Networks, Inc.

Respondent Nucentrix Spectrum Resources, Inc. (also, Spectrum Resources, Inc.) is 100% owned by Nucentrix Broadband Networks, Inc.

Respondents Nucentrix Telephone, Cyberwave Heartnet, and Clear Choice TV are not corporate entities.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Cerberus Partners, L.P., Cerberus International, Ltd., Cerberus Institutional Partners, L.P., and Stephen Feinberg (collectively, the "Cerberus Respondents"), and Respondents Nucentrix Broadband Networks, Inc. on behalf of and as next friend of its trademarks, trademark applications, and alleged assumed names – Nucentrix Telecom, Heartland Cable Television, Nucentrix Broadband Networks, Nucentrix Internet Services, Nucentrix Spectrum, Nucentrix Telephony, Cyberwave Heartnet, and Clear Choice TV – Nucentrix Internet Services, Inc., Heartland Cable Television, Inc., Nucentrix Spectrum Resources, Inc., Jack R. Crosby (incorrectly named as Jack R. Crosley), Marjean Henderson, J. R. Holland, Jr., John A. Sprague, L. Allen Wheeler, Richard B. Gold, Amy E. Ivanoff, Carroll D. McHenry, Terry S. Parker, Neil S. Subin, and R. Ted Weschler (collectively, the "Nucentrix Respondents") request that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by John Nolen, individually and on behalf of all persons similarly situated, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 26, 2002.

STATEMENT OF THE CASE

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to Petitioner's Statement of the Case because it omits or otherwise misstates certain pertinent facts and rulings of law that bear on what issues properly would be before the Court if certiorari were granted. The following

additional matters should be considered by the Court in ruling on the Petition.

Petitioner's Claims

Petitioner's Original Complaint and Amended Complaint filed in the United States District Court for the Southern District of Texas alleged that Respondents violated RICO, 18 U.S.C. §§ 1961-1968, by collecting unlawful debts under Texas state usury law. (Pet. at 4) This case turns entirely on Petitioner's inability as a matter of law – as determined by both the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit – to plead facts sufficient to allege a violation of Texas state usury law.

The Fifth Circuit's Affirmance of the District Court's Dismissal of Petitioner's Claims

On June 13, 2001, the United States District Court for the Southern District of Texas dismissed Petitioner's Original and Amended Complaints, with prejudice, for the reasons set forth in its decision in the nearly identical case *Rivera v. AT&T Corporation*, 147 F. Supp.2d 719 (S.D. Tex. 2001), *aff'd sub nom. Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002). The Fifth Circuit reviewed the District Court's dismissal of Petitioner's claims *de novo. Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al.*, 293 F.3d 926 (5th Cir. 2002). It affirmed the dismissal for three reasons, the first of which alone was dispositive of Petitioner's claims in their entirety.

First, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here, are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen,* 293 F.3d at 929. The Fifth Circuit held that its earlier-issued summary affirmance of the District Court's *Rivera* decision, "[f]or the reasons stated by the district court", *Rivera v. AT&T Corp.,* No. 01-409053 (5th Cir. March 25, 2002) (unpublished), *rhg. en banc denied* (5th Cir. April 29, 2002), was controlling in that regard.

Because Petitioner's RICO claims were predicated on the alleged collection of "unlawful debts," as defined under 18 U.S.C. § 1961(6), the Fifth Circuit held that Petitioner had to demonstrate, *inter alia*, "that Nucentrix . . . collected a debt that was unenforceable under Texas usury laws". *Nolen,* 293 F.3d at 929. Because it found that the facts pled failed, as a matter of law, to allege a violation of Texas state usury law, the Fifth Circuit held that Petitioner "failed, as a matter of law, to establish that Nucentrix collected an 'unlawful debt.'" *Id.*

Because the Fifth Circuit found that there was no "unlawful debt" – and therefore no violation of 18 U.S.C. § 1962 – it never reached the issue of whether injunctive and declaratory relief is available to private parties under 18 U.S.C. §§ 1964(a) and (c) to prevent and restrain violations of section 1962. Nor did the Fifth Circuit need to reach any alternative grounds for dismissal of Petitioner's RICO claims in the District Court, including that "the facts that have been alleged demonstrate that [Respondents] are not engaged in a RICO enterprise." *Rivera*, 147 F. Supp.2d at 725.

Second, the Fifth Circuit held that for claims arising under 18 U.S.C. § 1962(a), alleging an injury solely from the predicate racketeering acts themselves is not sufficient. *Id.* Instead, the Court held, "any injury must flow from *the use or investment of racketeering income.*" *Id.* (emphasis added in original) (citation omitted). The Court found that the facts pled alleged Petitioner's injury arose "solely from Nucentrix's assessment and collection of late fees, not from Nucentrix's use or investment of those fees." *Id.* For this reason as well, the Court held that Petitioner had failed to assert a valid claim under U.S.C. § 1962(a). *Id.* at 929-30.

Finally, the Fifth Circuit affirmed the dismissal of Petitioner's claim under 18 U.S.C. § 1962(d) for conspiracy to violate §§ 1962(a) and (c). The Court held that Petitioner's "failure to plead the requisite elements of either a § 1962(a) or a § 1962(c) violation implicitly means that [Petitioner] cannot plead a conspiracy to violate either section." *Id.* at 930 (citation omitted).

REASONS FOR DENYING THE WRIT

This case turns entirely on Petitioner's inability as a matter of law, as determined by both the Fifth Circuit and the District Court for the Southern District of Texas, to plead facts sufficient to allege a violation of Texas state usury law. Because the Fifth Circuit's analysis of the facts and its interpretation of Texas state law provided a complete basis for affirming the District Court's dismissal of Petitioner's claims, that Court's decision (i) did not decide an important, unsettled question of federal law, (ii) is not in conflict with a decision of another court of appeals, and

(iii) does not present a compelling reason for granting the Petition. Sup. Ct. R. 10(a), (c).

The carefully constructed Petition for Writ of Certiorari attempts to veil this fact through misleading presentations of the proceedings and holdings below. Presumably aware that the character of the proceedings below would not support a grant of the Petition, Petitioner attempts to bootstrap his case to an issue that this Court has decided to consider – whether injunctive and declaratory relief is available to private parties under RICO. However, that issue was not decided upon below.

Unless this Court were first to reverse both the Fifth Circuit's analysis of the facts alleged and its interpretation of Texas state usury law – the real issues underlying Petitioner's first question presented – it could not reach the other purported questions presented. Nor could any decision rendered by this Court on the propriety of injunctive or declaratory relief for private parties in Civil RICO actions affect the outcome of the decision below. Accordingly, Petitioner has failed to present a compelling reason to grant the writ, and the Petition should be denied. Sup. Ct. R. 10.

I. THE COURT OF APPEALS' DECISION AFFIRMING THE DISMISSAL OF PETITIONER'S RICO CLAIMS PREDICATED ON THE COLLECTION OF AN "UNLAWFUL DEBT" RESTS SQUARELY ON THE INTERPRETATION AND APPLICATION OF TEXAS STATE USURY LAW, AND THEREFORE DID NOT DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioner has made two assertions in its Petition that demonstrate the lack of a compelling reason to grant the writ. First, Petitioner's Original Complaint and Amended Complaint both "alleged that Respondents violated RICO, 18 U.S.C. §§ 1961-1968, by collecting unlawful debts under Texas usury law". (Pet. at 4) Second, that "[i]n this case, to properly plead a case based upon a collection of unlawful debt, [Petitioner] had to show that Nucentrix . . . collected a debt that was unenforceable under Texas usury laws. . . . " (Pet. at 12)

In the decision below, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here, are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al.*, 293 F.3d 926, 929 (5th Cir. 2002). Accordingly, the Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) – by Petitioner's own admission, a *sine qua non* of its RICO claims.

Petitioner characterizes the interpretation of Texas law by the Fifth Circuit as an error harmful to national

jurisprudence. Petitioner asserts that this Court should grant a writ of certiorari to address "the unresolved issue of what constitutes an unlawful debt actionable under the RICO statute." (Pet. at 10) However, what constitutes an unlawful debt under RICO is not "unresolved." It is expressly, concisely and unmistakably defined by the statute, in part, as a "debt . . . incurred or collected . . . which is unenforceable under State . . . law . . . because of the laws relating to usury . . . ." 18 U.S.C. § 1961(6).

That the Fifth Circuit did not decide differently is evident from the Petition. After its conclusory claim that the Fifth Circuit erred in its analysis of federal RICO law, Petitioner devotes its argument to the Court's application of the Texas Finance Code to the factual allegations. (Pet. at 12-16) Petitioner attempts to dress up this purely state law issue into one of "nationwide" importance based on the Fifth Circuit's alleged error in purportedly ignoring "charging-usury" cases in favor of "contracting-usury" cases. (Pet. at 16) This argument is a red herring. Petitioner relies on a Texas Supreme Court decision for the proposition that "[u]sury is contracting for, *charging*, or receiving interest in excess of a lawful amount." (Pet. at 12-13) (citation omitted) (emphasis added by Petitioner). Petitioner conveniently ignores the specific holding of the Fifth Circuit that the fixed administrative or late fees alleged here are "not regarded as *interest* under Texas law. . . . " *Nolen,* 293 F.3d at 929 (emphasis added). Accordingly, whether those fees were "contracted for" or "charged" is irrelevant.

The Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18

U.S.C. § 1962. That holding was the simple and necessary result of the Court's determination that the late fees at issue were not interest as a matter of Texas law, and therefore the facts pled did not allege a violation of Texas state usury law. Accordingly, the decision below did not decide an important, unsettled question of federal law, and, as such, Petitioner has failed to present a compelling reason for granting the writ. Sup. Ct. R. 10.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION ON THE AVAILABILITY OF INJUNCTIVE OR DECLARATORY RELIEF TO PRIVATE PARTIES UNDER RICO, BECAUSE PETITIONER'S CLAIM FOR INJUNCTIVE OR DECLARATORY RELIEF WAS MOOT AND THE FIFTH CIRCUIT NEVER REACHED THE ISSUE.

Because the Fifth Circuit held, on the grounds described above, that Petitioner failed as a matter of law to allege any violation of 18 U.S.C. § 1962, it never reached the issue on which Petitioner seeks this Court's review. Specifically, the Fifth Circuit did not – and properly could not – decide whether injunctive or declaratory relief is available to private parties under 18 U.S.C. §§ 1964(a) and (c), because those provisions are predicated on the existence of violations of section 1962. 18 U.S.C. §§ 1964(a), (c).

Petitioner's tortured characterizations of the Fifth Circuit's decision cannot succeed to put this issue properly before the Court. Before the issue was reached, it was rendered moot by the Fifth Circuit's holding that Petitioner had not alleged a violation of section 1962. Accordingly, it cannot seriously be contended that the Fifth

Circuit "refus[ed] to recognize . . . the validity of Nolen's claims for injunctive and declaratory relief [and therefore] widen[ed] the divide between the circuits on this very important issue . . . of whether injunctive relief is available to a private plaintiff bringing a civil action under RICO." (Pet. at 8)

Because the Fifth Circuit did not decide the issue, the decision below is not in conflict with any decisions that actually address the issue. Accordingly, Petitioner has failed to present a compelling reason for granting the writ. Sup. Ct. R. 10. In addition, because the Fifth Circuit did not decide the issue, Petitioner's Questions Presented numbers 2 and 3 seek consideration of questions not appropriately arising from or otherwise accurately reflecting the holding below. As such, those questions would not properly be before the Court if certiorari were granted.

III. THERE IS NO COMPELLING REASON FOR GRANTING THE PETITION BECAUSE ALTERNATE GROUNDS FOR AFFIRMING THE DISMISSAL OF PETITIONER'S CLAIMS EXIST THAT ARE NOT BEFORE THIS COURT.

There is no compelling reason for this Court to grant the Petition. Even if the Court were to grant the Petition, reverse the Fifth Circuit's interpretation of Texas state usury law, reach the other purported questions presented and remand the case, the dismissal of Petitioner's claims could still be summarily affirmed on alternate dispositive grounds not before this Court on the Petition.

In the decision below, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here,

are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen,* 293 F.3d at 929. As a result, the Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18 U.S.C. § 1962.

Because that holding in and of itself supported the affirmance of the District Court's dismissal of Petitioner's claims, the Fifth Circuit did not have to reach, and in fact did not reach, additional grounds dispositive as to all or some of the Respondents. One such fully dispositive alternate ground addressed by the District Court but not reached by the Court of Appeals was that "the facts that have been alleged demonstrate that [Respondents] are not engaged in a RICO enterprise." *Rivera*, 147 F. Supp.2d at 725.

Additional grounds not reached below support the disposition of Petitioner's claims against the Cerberus Respondents. For example, that Petitioner's claims against the Cerberus Respondents, based solely on their status as minority shareholders with the ability to appoint directors of the alleged corporate enterprise, were properly dismissed because Petitioner (i) failed to plead that the Cerberus Respondents had any role in the alleged misconduct in this case; (ii) failed to connect the Cerberus Respondents to the alleged misconduct in any specific way; and (iii) failed to plead facts that would enable Petitioner to pierce the corporate veil of Nucentrix.

Additional grounds not reached below support the disposition of Petitioner's claims against certain of the Nucentrix Respondents. For example, that Petitioner's

claims were properly dismissed as to Nucentrix's trademarks or assumed names – which are merely property rights, incapable of holding a legal or beneficial interest in property – because they do not constitute "persons," given the definition of "person" in 18 U.S.C. § 1961(3) as an "individual or entity capable of holding a legal or beneficial interest in property."

The Fifth Circuit held that based on its interpretation of Texas state usury law, Petitioner had failed as a matter of law to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18 U.S.C. § 1962. That holding was dispositive of all of Petitioner's RICO claims, and rendered unnecessary the Fifth Circuit's consideration of additional, alternate grounds on which the dismissal of Petitioner's claims could still be affirmed, even if this Court were to grant the Petition.

Because any decision rendered by this Court could, potentially, have no impact on the ultimate affirmance by the Fifth Circuit of the dismissal of Petitioner's claims, there is no compelling reason to grant the Petition. Sup. Ct. R. 10. The granting of the Petition in this case would advance neither this Court's ability to manage its appellate docket, nor the principles of efficiency that underlie Supreme Court Rule 10. Accordingly, Respondents respectfully submit that the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Cerberus Respondents and the Nucentrix Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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